INTERPRETIVE LETTER 93-020 (OCTOBER 27, 1993)

Corporation that only provides equipment financing to other corporations is not doing a general banking business.

We are in receipt of your letter in which you asked for the opinion of the Illinois Commissioner of Banks and Trust Companies ("Commissioner") regarding a subsidiary that would provide commercial financing for the members of the subsidiary's parent trade association. Specifically, you asked if the subsidiary would be required to apply to the Commissioner for a banking charter in order to conduct its proposed financing activities. It is the Commissioner's interpretation that the Illinois Banking Act, 205 ILCS 5/1 et seq. (1992) [formerly Ill. Rev. Stat. ch. 17, pars. 301 et seq. (1991)] ("Banking Act"), would not require the subsidiary to obtain a state banking charter as the subsidiary would not be engaged in a commercial banking business.

You explained in your letter and in previous telephone conversations that you represent a trade association that would like to assist its members in the purchasing of commercial equipment for their respective businesses. Your client has considered offering the financing services through a subsidiary. The subsidiary may be wholly owned by the association or partially owned by members of the association. The procedure for the financing in each member's case would involve the subsidiary's purchase of the equipment that would be needed by the member. The subsidiary would then finance the sale of the equipment to the member using the equipment or real estate as security. The subsidiary would have the ability to issue bonds and notes to acquire any necessary working capital for the equipment purchases. Your client has no plans for its subsidiary to participate in residential or consumer financing transactions. The subsidiary would not accept deposits or cash checks. The equipment financing would only be conducted by the subsidiary for the members of the trade association and no financing would be offered to the general public.

The definition of "bank" is set out in Section 2 of the Banking Act as "any person doing a banking business." That definition does not determine, however, whether a particular entity that is such a "bank" must obtain a banking charter. Such a statement is contained in Section 46 of the Banking Act, which provides:

Sec. 46. Natural person prohibited; penalty. No natural person or natural persons, firm or partnership, or corporation not having banking powers shall transact the business of banking or the business of receiving money upon deposit, or shall use the word "bank", "banker", or "banking" in connection with his or its business....

The proposed subsidiary would not accept deposits or hold itself out to the public by using the terms "bank," "banker" or "banking," and therefore the issue becomes whether the making of loans constitute transacting the business of banking. To resolve this

question, it is important to identify those activities that define a "bank" which must obtain a banking charter.

The predecessor to Section 46 was enacted in 1919 as Section 15**2** of "An act to revise the law with relation to banks and banking." That section provided in relevant part:

> '15**2**. After January 1, 1921, no natural person or natural persons, firm or partnership shall transact the business of banking or the business of receiving money upon deposit, or shall use the word "bank" or "banker" in connection with said business or shall transact the business of transmitting money to foreign countries or buying and selling foreign money or receiving money on deposit to be transmitted to foreign countries provided that express, steamship and telegraph companies may continue their business of transmitting money and receiving money to be transmitted.... Laws of 1919, p. 235.

Prior to enactment of this statute, "private banking" by individuals was deemed the right of any person, and in Wedesweiler v. Brundage, 130 N.E. 520, 297 Ill. 228 (1921), a case challenging the new restrictions on transmitting money, the court stated: "[i]n the absence of a statute the right of an individual to engage in the banking business in all or any of its departments is unrestricted." 130 N.E. 520, 522. The court also went on to quote with approval from Reed v. People, 125 Ill. 592, 18 N.E. 295, where the court described the essential characteristics of a bank as follows:

> The powers and functions of a bank are well stated in Oulton v. Savings Institution, 17 Wall. 117, as follows: 'Banks, in the commercial sense, are of three kinds, to wit: First, of deposit; second, of discount; third, of circulation. Strictly speaking, the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally, the business of banking consisted only in receiving deposits--such as bullion, plate, and the like--for safe-keeping until the depositor should see fit to draw it out for use; but the business in the progress of events was extended, and bankers assumed to discount bills and notes, and to loan money upon mortgage, pawn, or other security, and, at a still later period, to issue notes of their own, intended as a circulating currency, and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two, or even all three, of these functions, but it is still true that an institution, prohibited from exercising any more than one of those functions, is a bank, in the strictest commercial sense.'" 130 N.E. at 522.

After describing activities that are done by banks as well as other entities, such as dealing in foreign exchange and making loans, the court went on to say:

> Nevertheless, an individual who does one or more of these things is not necessarily engaged in the banking business, for one who only lends his

> own money, taking bonds and mortgages thereof, which he sells with a guaranty is not a banker. (citation omitted) An individual is not engaged in the banking business because he does some of the things which are frequently or usually done by banks. 130 N.E. at 523.

In addition to Section 46 of the Illinois Banking Act, Sections 3.05 and 3.10 of the Business Corporation Act of 1983, 805 ILCS 5/3.05 and 3.10 (1992) [Ill. Rev. Stat. ch. 32, pars. 3.05 and 3.10], establish that the exclusive power granted banks to engage in the general banking business does not exclusively grant to banks the power to make loans. Those sections provide in relevant part:

> Section 3.05. Purposes. Corporations for profit may be organized under this Act for any lawful purpose or purposes, except for the purpose of banking or insurance; provided, however, that corporations may be organized under this Act for the purpose of buying, selling, or otherwise dealing in notes (not including the discounting of bills and notes and not including the buying and selling of bills of exchange), open accounts, and other similar evidences of debt.... (emphasis added)

* * *

> Sec. 3.10. General powers. Each corporation shall have power:

* * *

> (i) To invest its surplus funds from time to time and to lend money for its corporate purposes, and to take and hold real and person property as security for the payment of funds so invested or loaned.

* * *

> (m) To make donations for the public welfare or for charitable, scientific, religious or educational purposes; to lend money to the State or Federal government; and, to transact any lawful business in aid of the United States. (emphasis added).

Many cases have focused on whether an entity is a "bank" for purposes of a particular statute. In Department of Banking and Consumer Finance of the State of Mississippi v. Clarke, 809 F. 2d 266 (5th Cir.), cert. denied, 107 S.Ct. 3240 (1987), the court concluded that state chartered thrifts were "state banks" for purposes of the National Bank Act because thrifts exercised a long list of traditional banking powers, and because thrifts could branch state-wide, as a matter of competitive parity national banks also could branch state-wide. In Heritage Bank and Trust Company v. William C. Harris, 132 Ill. App. 3d 969 (1st Dist. 1985), the court similarly determined that because of the many banking functions performed by a thrift, the federal savings and loan association that wanted to buy the state bank's assets was a "bank" for purposes of Section 68 of the Act.

These cases, however, did not focus on whether the entity must obtain a banking charter, because in their analysis those entities did have a banking charter, albeit a thrift banking charter.

In Wedesweiler, the court recognized that many activities are conducted by both banks and other entities. This continues to be true today. Banks, supermarkets, currency exchanges and travel agents commonly sell travelers checks and money orders. Banks, currency exchanges, supermarkets and other retail stores commonly accept utility bill payments. Banks, supermarkets, currency exchanges and the corner tavern commonly cash checks. Banks, pawnshops, personal finance companies, mortgage companies and commercial loan companies commonly make loans. The only lenders required by Illinois law to be licensed as lenders are those which make consumer loans, such as personal finance companies, pawnbrokers and residential mortgage companies.

Because banks no longer issues notes designed to circulate as currency, the core activity that remains unique to Banks as described in Wedesweiler is that they accept deposits of money. The only other entities that also accept deposits are other entities that are specifically empowered to accept deposits. Examples of these are savings and loan associations, savings banks, credit unions and, for some purposes, securities firms, trust companies and insurance companies.

Therefore, we conclude pursuant to the Act that, since the subsidiary will not accept deposits, hold itself out as having banking powers, or use the words "bank," "banker" or "banking" in connection with its business, and because it will only engage in making commercial loans, a banking charter is not required and the subsidiary is not subject to regulation by the Commissioner. Since the subsidiary would not be supervised by the Commissioner, we express no opinion as to whether other statutes or regulations might govern its activities.